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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOHN RAMBO AND METROPOLITAN STEVEDORE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the "change in conditions" that permits modification of a disability award under Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, includes a change in an injured employee's wage-earning capacity that results from factors other than a change in the employee's physical condition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs of the United States Department of Labor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 28 F.3d 86. The decisions and orders of the Benefits Review Board (App., *infra*, 5a-9a) and administrative law judges (App., *infra*, 10a-15a, 16a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1994. The petition for rehearing filed by respondent Metropolitan Stevedore Company was denied on August 10, 1994. App., *infra*, 23a.[1] The petition for rehearing filed by the Director, Office of Workers' Compensation Programs, was denied on September 14, 1994. App., *infra*, 21a-22a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(10) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(10), provides in relevant part that " '[d]isability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Section 22 of the LHWCA, 33 U.S.C. 922, provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, * * * review a compensation case (including a case under which

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[1] Metropolitan Stevedore Company has also filed a petition for a writ of certiorari in this case, which has been docketed as No. 94-820.

payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation.

STATEMENT

1. In 1980, respondent John Rambo injured his back and leg while serving as a longshore worker for respondent Metropolitan Stevedore Company. App., *infra*, 17a. He filed a disability claim with the Department of Labor under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*[2] The LHWCA defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

In 1983, an administrative law judge (ALJ) accepted a stipulation between Rambo and Metro-

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[2] Administration of the LHWCA is entrusted to the Secretary of Labor, see 33 U.S.C. 939(a), and that task has been assigned by regulation to the Office of Workers' Compensation Programs (OWCP), see 20 C.F.R. 701.202(a). The OWCP investigates claims, and in uncontested cases a district director (formerly a deputy commissioner, see 20 C.F.R. 702.105) in OWCP may issue awards. 33 U.S.C. 919(c) and (e); 20 C.F.R. 702.315(a). In contested cases, parties may obtain a hearing before an administrative law judge (ALJ), who then issues a decision awarding or denying benefits. 33 U.S.C. 919(d); 20 C.F.R. 702.316, 702.331 *et seq.* An ALJ decision is reviewable by the Department's Benefits Review Board, and Board decisions are reviewable in the courts of appeals. 33 U.S.C. 921(a)-(c). Modification of compensation awards is governed by 33 U.S.C. 922 and 20 C.F.R. 702.373.

politan that Rambo had sustained a 22½% permanent partial disability that had produced a weekly wage loss of $120.24 per week, or 22½% of his average weekly wages of $534.38. App., *infra*, 17a-18a. Under Section 8(c)(21) of the LHWCA, Rambo therefore received an award of $80.16 per week, which represented 66⅔% of "the difference between the average weekly wages of [Rambo] and [Rambo's] wage-earning capacity thereafter in the same employment or otherwise." 33 U.S.C. 908(c)(21). See App., *infra*, 17a-18a. Pursuant to Section 8(f) of the LHWCA, 33 U.S.C. 908(f), the ALJ also limited Metropolitan's liability for permanent disability compensation to 104 weeks, after which a Special Fund, which the Director of the Office of Workers' Compensation Programs (OWCP) administers, became liable for the $80.16 weekly payments. App., *infra*, 19a-20a; see 33 U.S.C. 944(i)(2).[3]

2. After this award, Rambo attended crane school and obtained longshore work as a crane operator. App., *infra*, 2a, 6a-7a, 13a. He worked in that position for four to five years and performed additional

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[3] Although the Special Fund assumed liability for Rambo's award after the first 104 weeks of benefits, Metropolitan retains a financial interest in the outcome of this case. Under the LHWCA, an employer's required contribution to the Special Fund depends in part on the amount of payments made by the Fund "during the preceding calendar year which are attributable to the" employer. 33 U.S.C. 944(c)(2)(B). In recognition of their continuing financial interest, employers "are given the authority to monitor their claims in the special fund," 20 C.F.R. 702.148(b), and are among the "part[ies] in interest" who are permitted to seek modification of an award. 33 U.S.C. 922; see 20 C.F.R. 702.148(b) (employer "can initiate [a] proceeding to modify an award of compensation after the special fund has assumed the liability to pay benefits").

work as a heavy lift truck operator when time was available. *Id.* at 13a. Between 1985 and 1990, his average weekly earnings ranged from approximately $1,307.00 to $1,690.50, or more than three times his pre-injury earnings. *Id.* at 14a; see also *id.* at 2a, 7a. His physical condition, however, remained essentially unchanged. See *id.* at 2a, 14a. In 1989, Metropolitan sought modification of the compensation award pursuant to Section 22 of the LHWCA, 33 U.S.C. 922, arguing that those increased earnings represented a "change in conditions" such that Rambo was no longer "disab[led]" under the Act. App., *infra*, 6a, 13a.

In 1991, a second ALJ agreed with Metropolitan and terminated Rambo's disability payments. App., *infra*, 10a-15a. Relying on *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 282 (1984), aff'd, 776 F.2d 1225 (4th Cir. 1985), the ALJ reasoned that modification may be based on a change in a claimant's economic condition following an award. App., *infra*, 12a, 13a-15a. Recognizing that higher post-injury earnings do not necessarily establish an employee's wage-earning capacity, the ALJ then found that Rambo in fact no longer suffered a loss of wage-earning capacity. *Id.* at 14a. In particular, the ALJ noted that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that Rambo was at no greater risk of losing his present job or seeking employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 14a-15a.[4]

[4] The ALJ also rejected Rambo's arguments that only the ALJ who had issued the 1983 award could modify it and that the 1983 award, which was based on stipulated facts,

The Benefits Review Board affirmed. App., *infra*, 5a-9a. Relying on *Fleetwood*, the Board rejected Rambo's argument that modification could not be granted absent a showing of a change in a claimant's physical condition. *Id.* at 8a.

3. The court of appeals reversed. App., *infra*, 1a-4a. The court construed its own precedents to "make clear that only a change in a claimant's *physical* condition can justify an award modification." *Id.* at 2a; see *id.* at 3a (citing *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir. 1936), rev'd on other grounds, 301 U.S. 174 (1937); *McCormick S.S. Co.* v. *United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933)). Thus, in the court's view, "[a] change in a claimant's wages, training, skills, or educational background is insufficient." App., *infra*, 2a.

The court recognized that the Fourth Circuit had reached a contrary result in *Fleetwood*. It agreed with the dissenting judge in *Fleetwood*, however, that "the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule." App., *infra*, 3a. The court also concluded that the Fourth Circuit's rule conflicts with *General Dynamics Corp.* v. *Director, OWCP*, 673 F.2d 23, 25 n.6 (1st Cir. 1982), and *Burley Welding Works, Inc.* v. *Lawson*, 141 F.2d 964, 966 (5th Cir. 1944). App., *infra*, 4a.

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could not be modified because it was a "settlement." App., *infra*, 11a-12a; see 33 U.S.C. 922 (settlements not subject to modification); 20 C.F.R. 702.373(a) (same). The Benefits Review Board agreed that the 1983 award was not a settlement, see App., *infra*, 7a-8a, and did not discuss the claimant's arguments concerning the ALJ's authority to modify. The court of appeals did not address either of those issues.

The court subsequently denied petitions for rehearing with suggestions for rehearing en banc filed by Metropolitan and the Director.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision limits the "conditions" that will support modification under Section 22 in a manner that has no basis in the statutory text. Its holding also directly conflicts with *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985). The Ninth Circuit's decision is likely to disrupt the Director's administration of the LHWCA and possibly the Black Lung Benefits Act, which incorporates Section 22 of the LHWCA. For those reasons, review is warranted.

1. By its terms, Section 22 of the LHWCA allows modification because of a "change in conditions." 33 U.S.C. 922. Congress's use of the plural "conditions" strongly suggests that modification is not limited to a change in only one condition, such as a claimant's physical condition. See, *e.g.*, *The American Heritage Dictionary of the English Language* 393 (3d ed. 1992) ("condition" may mean, *inter alia*, a "[s]tate of health," while "conditions" means "existing circumstances"). The Ninth Circuit's contrary view is at odds with this Court's decisions construing Section 22 broadly and refusing to read unstated limitations into that Section. See *Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1, 7-8, 11 (1975) (refusing, despite ambiguity in Section 22, to create a limitations period for acting on a timely filed claim); *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-256 (1971) (per curiam) (refusing to limit the "mistake in a determination of fact" ground for modification to mistakes that are demonstrated by new evidence rather than by the agency adjudica-

tor's "further reflection on the evidence initially submitted"); *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 462 (1968) (rejecting a construction of Section 22 that limited mistakes to "clerical errors and matters concerning an employee's disability, not to matters concerning an employer's liability").

The structure and purposes of the LHWCA also demonstrate that the changed conditions that may provide a basis for modification are not limited to changes in a claimant's physical condition. In death benefit cases, for example, eligibility depends on whether a deceased employee's survivor qualifies as a dependent spouse, child, or other dependent relative. See 33 U.S.C. 909(b)-(d). Eligibility ends when a spouse dies or remarries, a child's age or status as a student or disabled dependent changes, or another relative ceases to be dependent. 33 U.S.C. 902(14), 909(b) and (d). Those changes do not involve a claimant's physical condition, but the Department of Labor has long regarded them as bases for modification. See 43 Fed. Reg. 36,786 (1978) (comments concerning regulations under Black Lung Benefits Act).[5] Similarly, payment of disability and death benefits depends in part upon whether a claimant is receiving concurrent benefits under another applicable law. 33 U.S.C. 903(e); see also 30 U.S.C. 932(g) (Black Lung Benefits Act). Accordingly, a decision by state authorities concerning a claimant's entitlement to such benefits may be considered an economic

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[5] The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, incorporates a number of LHWCA provisions, including Section 22's provision for modification based on a change in conditions or a mistake in a determination of fact. See 30 U.S.C. 932(a) (incorporation provision); 20 C.F.R. 725.310(a) (modification provision).

change in conditions that supports modification. *McDougall* v. *E.P. Paup Co.*, 21 Ben. Rev. Bd. Serv. (MB) 204, 208 (1988), aff'd, 999 F.2d 1341 (9th Cir. 1993); see also *Dingess* v. *Director*, OWCP, 12 Black Lung Rep. (MB) 1-141 (1989); 43 Fed. Reg. 36,786 (1978) (Black Lung Benefits Act).

Like those non-physical conditions, a loss of wage-earning capacity is one of the conditions for entitlement to benefits, and a worker's wage-earning capacity is not determined solely on the basis of his or her physical condition. As set forth above, the LHWCA defines "[d]isability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." 33 U.S.C. 902(10). Accordingly, in "non-schedule" cases such as the instant one, courts have long recognized that "[t]he degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, his mentality, his education, and the availability of that type of work which he can do." *Eastern S.S. Lines, Inc.* v. *Monahan*, 110 F.2d 840, 842 (1st Cir. 1940); accord, *e.g.*, *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1037-1038 (5th Cir. 1981); *American Mut. Ins. Co.* v. *Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961).[6] A claimant who is physically able to

[6] In disability cases compensated under a "schedule" of fixed periods of compensation for particular partially disabling physical impairments, see 33 U.S.C. 908(c)(1)-(20), (22), or under a "retiree" provision, see 33 U.S.C. 908(c)(23), the medical condition is the sole basis for determining the compensation due. See *Bath Iron Works Corp.* v. *Director, OWCP*, 113 S. Ct. 692, 695-696 & n.4 (1993).

work may thus be permanently and totally disabled under the LHWCA if there is no work available that the claimant can perform, see *Eastern*, 110 F.2d at 841-842, while a claimant who has a physical impairment from an injury may not be disabled under the Act if the availability of alternative employment establishes that there has been no loss of wage-earning capacity. See *Owens* v. *Traynor*, 274 F. Supp. 770, 773-776 (D. Md. 1967), aff'd, 396 F.2d 783 (4th Cir.), cert. denied, 393 U.S. 962 (1968). Compare *Heckler* v. *Campbell*, 461 U.S. 458, 459-462 (1983) (discussing parallel principles under Social Security disability programs).

Because workers in non-schedule cases are compensated for loss of wage-earning capacity, their "wage-earning capabilities should be relevant when considering a modification of an award." *Fleetwood*, 776 F.2d at 1229; accord *Avondale Shipyards, Inc.* v. *Guidry*, 967 F.2d 1039, 1042 n.6 (5th Cir. 1992); 3 A. Larson, *The Law of Workmen's Compensation* § 81.31(e) (1994). For example, "if an employee initially was awarded a 40-percent partial disability award, and later found that his wage-earning capacity was much less than originally determined, he could then seek a modification." *Fleetwood*, 776 F.2d at 1229; see also *Hole* v. *Miami Shipyards Corp.*, 640 F.2d 769, 772-773 (5th Cir. 1981); *Vasquez* v. *Continental Maritime*, 23 Ben. Rev. Bd. Serv. (MB) 428 (1990); cf. *Edwards* v. *Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993) (claimant disabled despite temporary work), cert. denied, 114 S. Ct. 1539 (1994). Conversely, a claimant who initially has a work-related loss of wage-earning capacity may acquire new skills that eliminate the loss. Allowing an employer to seek modification under those circumstances

furthers the LHWCA's goal of rehabilitating disabled workers, see 33 U.S.C. 908(g), 939(c), by creating an incentive for employers to participate in rehabilitation programs. Such a modification is also fair to injured workers, because they are treated the same way on modification as at an initial hearing: In each instance, benefits are awarded for a non-schedule physical impairment only insofar as that impairment causes a loss of wage-earning capacity. See *Fleetwood*, 776 F.2d at 1232.[7]

In denying modification, the court of appeals in this case failed to address either the language or the purposes of the Act. It also identified nothing in the legislative history to justify its narrow reading of Section 22. The Director represents the agency charged with administering the Act, see 33 U.S.C. 939(a); 20 C.F.R. 701.202(a), and her construction of the phrase "change in conditions" is therefore entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See, *e.g.*, *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790, 793-795 (2d Cir. 1992); *Force* v. *Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co.* v. *Howard*, 904 F.2d 206, 208-209 (4th Cir. 1990); *Boudreaux* v. *American Workover, Inc.*, 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), cert. denied, 459 U.S.

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[7] The *Fleetwood* court noted as well that "[w]ithout such a modification procedure, workers who had secured new skills and employment would be receiving disability compensation when they were not disabled and an unequitable distribution of limited financial resources would result." 776 F.2d at 1229.

1170 (1983).[8] The court of appeals erred in rejecting that interpretation.

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[8] Not all courts of appeals have deferred to the Director's construction of the LHWCA. See *Sea-Land Serv., Inc.* v. *Rock*, 953 F.2d 56, 59 (3d Cir. 1992); *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 287-288 (6th Cir. 1988); cf. *Director, OWCP* v. *General Dynamics Corp.*, 980 F.2d 74, 78 (1st Cir. 1992) (reserving question). Courts refusing to defer have relied on the mistaken premise that "neither the Director nor the [Benefits Review] Board is the officer or agency charged with the administration of the [LHWCA]." *Director, OWCP* v. *O'Keefe*, 545 F.2d 337, 343 (3d Cir. 1976). In fact, the Director acts as the delegatee of the Secretary of Labor, see 20 C.F.R. 701.202(a), who has express authority to "administer" the Act and to "make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a). Compare *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696-697 (1991); *Martin* v. *OSHRC*, 499 U.S. 144 (1991); *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 159 (1987).

Regulations promulgated by the Director clearly presume that modification of a disability award may be granted on the basis of changes that do not involve the worker's physical condition. Those rules provide that "[a]n employer or insurance carrier may conduct any reasonable investigation regarding cases placed into the special fund by the employer or insurance carrier. Such investigation may include, but shall not be limited to, a semi-annual request for earnings information[,] * * * periodic medical examinations, vocational rehabilitation evaluations, and requests for any additional information needed to effectively monitor such a case." 20 C.F.R. 702.148(c). The regulatory provision governing modification of awards establishes procedures to be followed "[i]f the investigation, described in [20 C.F.R.] 702.148(c), discloses a change in conditions and the employer or insurance carrier intends to pursue modification of the award of compensation." 20 C.F.R. 702.373(d). The scope of the permissible investigation, and the express recognition that the investigation may reveal a "change in conditions" warranting

2. The Ninth Circuit's decision in this case directly conflicts with the Fourth Circuit's decision in *Fleetwood*. In each case, an employer requested modification based on a change in the claimant's wage-earning capacity without showing a change in the claimant's physical condition. *Fleetwood* held that Section 22 permits modification, see 776 F.2d at 1228; the court of appeals in this case held that it does not. Indeed, the court of appeals in the present case acknowledged the conflict, see App., *infra*, 3a, and the court's subsequent refusal to rehear the case en banc indicates that the Ninth Circuit will adhere to its current view.[9]

Review is warranted to resolve this conflict because the Ninth Circuit's decision will disrupt the Director's administration of the LHWCA. Uniform administration on a nationwide basis for land-based maritime workers is one of the fundamental purposes of the Act. See *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S.

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modification of an award, plainly reflect the premise that the grounds for modification extend beyond changes in the employee's physical condition.

[9] We do not agree with the Ninth Circuit's assessment, see App., *infra*, 4a, that *Fleetwood* conflicts with the First Circuit's holding in *General Dynamics Corp.* v. *Director, OWCP*, 673 F.2d 23, 25 n.6 (1982), or with the Fifth Circuit's holding in *Burley Welding Works, Inc.* v. *Lawson*, 141 F.2d 964, 966 (1944). We acknowledge, however, that dicta in those and other courts of appeals' decisions are consistent with the Ninth Circuit's reading of Section 22. See *Director, OWCP* v. *Drummond Coal Co.*, 831 F.2d 240, 244 n.9 (11th Cir. 1987); *Director, OWCP* v. *Edward Minte Co.*, 803 F.2d 731, 735 (D.C. Cir. 1986); *Verderane* v. *Jacksonville Shipyards, Inc.*, 772 F.2d 775, 780 (11th Cir. 1985). The question presented in this case has also been raised in *Eller & Co.* v. *Director, OWCP (Howard)*, No. 93-8095 (11th Cir.).

715, 717 (1980). Moreover, the Ninth Circuit's decision contravenes the principle that employees with similarly impaired wage-earning capacities should be treated alike. As discussed above, one of the LHWCA's goals is to rehabilitate permanently disabled employees so that they may engage in remunerative occupations. 33 U.S.C. 939(c); cf. 42 U.S.C. 12101(a)(8) (Supp. IV 1992) (Americans with Disabilities Act of 1990 seeks to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals). The Ninth Circuit's rule treats such employees as still disabled when they complete rehabilitation and obtain higher-paying employment after an award is issued, even though they would not be disabled if they had completed rehabilitation and obtained their new positions before receiving an award. The decision thereby creates an incentive for employers either to avoid rehabilitation programs [10] or to delay administrative proceedings so that no final award issues until rehabilitation is complete.

The rule announced by the Ninth Circuit is unfair not only to employers whose employees have increased their wage-earning capacities since the original award of benefits, but also to employees who have suffered further decreases in their wage-earning capacities since obtaining their benefit awards. By contrast, the Fourth Circuit's decision avoids those inequitable results. See *Fleetwood*, 776 F.2d at 1229. The Ninth

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[10] Such programs included 318 successfully rehabilitated employees and 1,211 continuing participants at the end of fiscal year 1992. Employment Standards Admin., U.S. Dep't of Labor, *Longshore and Harbor Workers' Compensation Act: Annual Report on Administration of the Act During Fiscal Year 1992*, at 3, 8-9 (1993) [hereinafter *1992 Annual Report*].

Circuit's rule could also be costly for the Special Fund, which the Director administers. See *1992 Annual Report* 6, 8 (Fund paid more than $86.3 million in more than 4,500 "second injury" or Section 8(f) cases and approximately $4.4 million for rehabilitation services in fiscal year 1992). If "only a change in a claimant's *physical* condition can justify an award modification," App., *infra*, 2a, the Fund will be forced to pay for benefits even when they are unnecessary to compensate injured workers for any continuing loss of wage-earning capacity.[11] The Director may also be unable under the LHWCA and the Black Lung Benefits Act to have benefit awards modified or terminated when a claimant begins to receive concurrent benefits under another law or when an employee's dependents lose eligibility. See pages 8a-9a, *supra*.

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[11] Section 8(j) of the LHWCA, 33 U.S.C. 908(j), requires claimants to report post-award earnings and provides for the forfeiture of benefits for failure to report. If the decision below stands, no possibility of modification will exist for claimants who report increases in earnings due to improved wage-earning capacities absent a change in physical condition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate Litigation

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor

DECEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-70783

JOHN RAMBO, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY, RESPONDENTS

Petition for Review of an Order
of the Benefits Review Board

Argued and Submitted March 14, 1994

Decided June 24, 1994

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

Opinion by Judge LEAVY.

LEAVY, Circuit Judge:

In 1983, the appellant John Rambo ("Rambo") was awarded $80.16 per week in worker's compensation for a permanent partial disability to his back

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* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

and leg. Rambo subsequently attended crane school and obtained a position as a crane operator. In 1990, Rambo's employer, Metropolitan Stevedore Company ("Metropolitan") moved to have his benefits terminated. Despite the fact that Rambo's physical condition had not changed, Metropolitan argued that Rambo was no longer eligible for the benefits because he was presently working at a job that paid him $1,505.21 per week—almost 300% of Rambo's pre-injury average weekly wage.

The Administrative Law Judge ("ALJ") found in favor of Metropolitan and terminated Rambo's benefits. The ALJ determined that Rambo's new job was a "change in conditions" within the meaning of 33 U.S.C. § 922.[1] The Benefits Review Board affirmed. Both the ALJ's and the Board's decisions relied upon *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir.1985), which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement for modification. Neither decision cited any Ninth Circuit cases. However, our cases make clear that only a change in a claimant's *physical* condition can justify an award modification. A change in a claimant's wages, training, skills, or educational background is insufficient. Accordingly, we reverse the decision of the Benefits Review Board ("BRB").

Analysis

Under our cases, a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the "change in conditions" requirement for an award modification. Rather, a

[1] Section 922 provides for a modification of awards for, among other things, a "change in conditions."

party seeking to modify an award must prove that the claimant has undergone a change in his physical condition. *See, e.g., Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, 760 (9th Cir.1936), *rev'd on other grounds*, 301 U.S. 174, 57 S.Ct. 682, 81 L.Ed. 988 (1937) ("The expression 'change in conditions' refers to a *change in the physical condition* of the employee." (emphasis added)).

For example, in *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir.1933), we held that a mere change in a claimant's wages—without proof of a change in his physical condition—was not sufficient to satisfy the "change in conditions" requirement of 33 U.S.C. § 922. *See id.* at 86 (rejecting the petition for modification because it was not based upon "*a change in physical condition*," but rather upon the claimant's changed earnings (emphasis added)).

Here, the respondent relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in a claimant's wages could satisfy the "change in conditions" requirement of 33 U.S.C. § 922. As the *Fleetwood* dissent noted, the Fourth Circuit's rule is in direct conflict with the Ninth Circuit's rule. *See id.* at 1235 (Warriner, J., dissenting) (noting that "[b]eginning with the first opinion dealing with the question, [*McCormick*,] handed down in 1933, and continuing thereafter, the courts have uniformly interpreted the term "change in conditions" in [33 U.S.C. § 922] to refer exclusively to a *change in physical condition* of the employee receiving compensation." (emphasis added)). A three-judge panel may not overturn Ninth Circuit precedent. *United States v. Lewis*, 991 F.2d 524,

526 n. 1 (9th Cir.), *cert. denied* — U.S. —, 114 S.Ct. 216, 126 L.Ed.2d 172 (1993).

As the *Fleetwood* dissent points out, *id.*, the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits. *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 673 F.2d 23, 25 n. 6 (1st Cir.1982) ("Courts uniformly have held that a 'change in conditions' . . . means a change in the employee's *physical* condition, not other conditions." (emphasis in original)); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 964, 966 (5th Cir.1944) (citing *McCormick* and *Pillsbury;* and holding that "[i]t has been uniformly held that the term 'change in conditions' . . . means a change in the employee's *physical condition*, and not other conditions" (emphasis added)). Thus, this circuit's precedent is supported by the clear weight of authority.

REVERSED.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 91-1538

JOHN RAMBO, CLAIMANT-PETITIONER

v.

METROPOLITAN STEVEDORE COMPANY,
SELF-INSURED EMPLOYER-RESPONDENT

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
RESPONDENT

Date Issued: Nov. 9, 1992

DECISION AND ORDER

Appeal of the Decision and Order Granting Modification of Daniel Lee Stewart, Administrative Law Judge, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Modification (83-LHC-242) of Administrative Law Judge Daniel Lee Stewart on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901

et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

On September 9, 1980, claimant injured his back and leg while working for employer. In a Decision and Order dated November 28, 1983, Administrative Law Judge James J. Butler awarded claimant temporary total disability compensation from September 10, 1980 through November 22, 1981, and permanent partial disability compensation thereafter. Pursuant to the stipulations of the parties, the administrative law judge found that claimant's average weekly wage at the time of injury was $534.38, that claimant had sustained a 22½ percent impairment of the whole person which the parties equated to a $120.24 per week loss in wage-earning capacity, and that accordingly claimant was entitled to permanent partial disability compensation based on an $80.16 per week compensation rate. In addition, the administrative law judge awarded claimant's counsel an attorney's fee payable by employer, *see* 33 U.S.C. § 928, and awarded employer relief pursuant to Section 8(f), 33 U.S.C. § 908(f).

Thereafter on October 30, 1989, employer sought modification of the permanent partial disability award pursuant to Section 22, 33 U.S.C. § 922, arguing that there had been a change in claimant's wage-earning capacity such that he is no longer disabled. In a Decision and Order dated May 29, 1991, Administrative Law Judge Daniel Lee Stewart granted modification, noting that claimant had completed training and was currently working as a crane opera-

tor, a higher paying yet less strenuous job, which he had been performing for four or five years and was not in danger of losing. In addition, Judge Stewart noted that claimant also was able to obtain additional pay by volunteering to work as a lift truck operator and heavy lift truck operator. Finally, Judge Stewart found that claimant's average weekly wage had more than tripled between the time of his injury in 1980 and the hearing in 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, he concluded that claimant no longer had a loss in his wage-earning capacity. The administrative law judge therefore ordered that the award of permanent partial disability compensation be terminated as of the date of the decision and order. Claimant appeals, arguing that the granting of modification was improper. Employer and the Director, Office of Worker's Compensation Programs, respond, urging affirmance.

Under Section 22 an aggrieved party may seek modification of a compensation award within one year of the date of last payment of compensation or within one year of the denial of a claim based on a change in condition or mistake of fact. 33 U.S.C. § 922. With the enactment of the 1984 Amendments to the Act, Section 22 was amended to prohibit the modification of settlements which were entered into pursuant to Section 8(i), 33 U.S.C. § 908(i)(1988). The Board had previously reached the same conclusion under the pre-1984 Act. *See Lambert v. Atlantic & Gulf Stevedores*, 17 BRBS 68 (1985).

Initially, we reject claimants' assertion that Judge Butler's original Decision and Order constitutes the approval of a Section 8(i) settlement which could not be modified pursuant to Section 22. This decision

fails to provide for the complete discharge of employer's liability and lacks any findings as to whether the compensation awarded was in claimant's best interest as was required under Section 8(i) at the time of Judge Butler's decision. 33 U.S.C. § 908(i) (1982) (amended 1984). Accordingly, Judge Butler's Decision and Order was, as Judge Stewart properly determined, simply an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22. *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991); *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988).

Claimant's contention that the administrative law judge erred in granting modification absent a showing of a change in his physical condition is similarly without merit. Contrary to claimant's assertions Judge Stewart correctly recognized that modification pursuant to Section 22 may be granted based solely upon a change in claimant's economic condition. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1991); *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49 (1989). Claimant has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on claimant's increase in wage-earning capacity after the original award of benefits. We therefore affirm his determination that claimant was no longer disabled as of the date of his decision.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. MCGRANERY
Administrative Appeals Judge

[Certificate of Service Omitted in Printing]

APPENDIX C

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street—Suite 600
San Francisco, California 94105

Case No. 83-LHC-242

OWCP No. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

against

METROPOLITAN STEVEDORE COMPANY,
SELF-ADMINISTERED EMPLOYER

DECISION AND ORDER GRANTING MODIFICATION

This proceeding involves a request for modification of the November 28, 1983, Decision and Order Awarding Benefits of Administrative Law Judge Butler. The request for modification was filed on October 30, 1989, pursuant to the provisions of [33] U.S.C. § 922.

ISSUES

1. Whether the employer's request for modification of the 1983 Decision and Order under the provisions of [33] U.S.C. § 922 should be granted.
2. Whether the administrative law judge who approved the settlement is the one required to rule on the issue of modification.

Background

The parties stipulated that the Claimant, John Rambo, became permanently, partially disabled as the result of an injury to his back and leg sustained on September 9, 1980; that the Claimant's condition became permanent and stationary on November 16, 1981; and that the Claimant sustained an overall current permanent partial disability equivalent to 22½% of the whole person amounting to a compensation rate of $80.16 per week for permanent partial disability. This stipulated "settlement" was incorporated into a Decision and Order of the administrative law judge. The only issue which the administrative law judge decided in his Decision and Order was whether § 908(f) was applicable.

Then, on October 30, 1989, Employer filed an application for modification under Section 922 alleging that the Claimant's current earning capacity had increased substantially.

JURISDICTION

A. *Administrative Law Judge*

Claimant alleges that the motion for modification must be heard by the same administrative law judge assigned to the original claim. This allegation is without merit. In *Finch v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 196 (1989), the Benefits Review Board held that there is no requirement under the Act that a motion for modification must be heard by the same administrative law judge assigned to the original claim.

B. *Section 922 Modification*

Claimant contends that the stipulations contained in the November 28, 1983, Decision and Order of the

administrative law judge constitute a settlement between the parties. However, Judge Butler's Decision and Order awarding benefits does not constitute the approval of a settlement because it fails to provide in specific terminology for the complete discharge of employer's liability and does not contain findings as to whether the compensation awarded was in the Claimant's best interest as is required under Section 8(i) of the Act. *Finch v. Newport News Shipbuilding and Dry Dock Company, supra.* Therefore, Judge Butler's Decision and Ord[illegible] must be considered as an award of benefits based on the agreements and stipulations of the parties which is subject to modification pursuant to Section 22.

DISCUSSION

In the original Decision and Order dated November 28, 1983, it was stipulated that the Claimant's average weekly wages were $534.38 per week at the time of the pertinent injury, that Claimant sustained an overall current permanent partial disability equivalent to 22.5% of the whole person which produced a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

Section 22 of the Act, 33 U.S.C. § 922, authorizes the modification of a Decision and Order based on a change in condition or mistake of fact at any time prior to one year after the last payment of compensation. Modification based on a change in condition may be granted in cases in which the claimant's economic condition has changed following the entry of an award of compensation. *Fleetwood v. Newport News Shipbulding and Dry Dock Company,* 16 BRBS 282 (1984).

Employer in the instant case contends that since Claimant is presently earning more money than at the time of his injury, Claimant did not have a loss of wage-earning capacity. However, higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649 (1979). One has to consider wage-earning capacity in an open labor market under normal employment conditions.

Claimant testified that he was working as a longshoreman in 1980 when he was injured, and that he is currently working fulltime as a longshoreman (Tr. 27-8).[1] He is presently working steadily as a crane operator for American President Lines (Tr. 28, 32). He has been working as a crane operator for four or five years (Tr. 28). In addition to working as a crane operator, Claimant volunteers for work as a lift truck operator and a heavy lift truck operator for which he receives additional pay (Tr. 28-30). When Claimant works as a crane operator, he works most of the time as a gantry crane operator (Tr. 31). The crane which he operates is 131 feet high (Tr. 31). In order to reach the place where he works, Claimant has to climb a 12 to 15 foot ladder and then take an elevator (Tr. 31). As a crane operator, he is not allowed under the contract to work more than 42.5 hours per week (Tr. 33).

According to the Claimant, he is now making $1,550.00 per week (Tr. 36). He prefers doing crane work because it pays more money and it is easier than some of the other jobs (Tr. 38).

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[1] In this decision, "CX" refers to Claimant's Exhibits, "EX" refers to Employer's Exhibits and "Tr." refers to the transcript of the hearing.

Claimant testified that his physical condition since 1983, when he was awarded permanent partial disability, has remained about the same (Tr. 38-9).

According to the Claimant, Matson Lines has laid off 50 men; however, there has been no indication by the company for which he works that anyone is going to be laid off (Tr. 34).

The evidence in the instant case shows that Claimant earned a total of $70,662.67 for 1985 for an average weekly wage of $1,358.90; a total of $68.006.22 for 1986 for an average weekly wage of $1,307.81; a total of $67,953.72 for 1987 for an average weekly wage of $1,306.80; a total of $76,332.19 for 1988, for an average weekly wage of $1,467.93; a total of $87,873.53 for the work beginning December 31, 1988, and ending December 23, 1989, for an average weekly wage of $1,689.88; and a total of $67,619.96 for the week beginning December 30, 1989, and ending September 22, 1990, for an average weekly wage of $1,690.50.

Claimant's average weekly wages have increased from $534.38 per week in 1980 when Claimant was injured to $1,690.50 as of September 22, 1990. This demonstrates that the Claimant's average weekly wages more than tripled from 1980 to 1990. After taking into consideration the increase in wages due to the rate of inflation and any increase in salary for the particular job, it is evident that Claimant no longer has a wage-earning capacity loss. Although Claimant testified that he might lose his job at some future time, the evidence shows that Claimant would not be at any greater risk of losing his job than anyone else. Moreover, no evidence has been offered to show that Claimant's age, education, and vocational training are such that he would be at greater risk of losing

his present job or in seeking new employment in the event that he should be required to do so. Likewise, the evidence does not show that Claimant's employer is a beneficent one. On the contrary, the evidence shows that Claimant is not only able to work full time as a crane operator, but that he is able to work as a heavy lift truck operator when the time is available within which to do so.

Accordingly, I find that the Claimant no longer has a wage-earning capacity loss and that his disability payments should be discontinued effective on the date of this Decision and Order.

ATTORNEY'S FEES

Inasmuch as the Claimant did not prevail in this proceeding, the attorney is not entitled to any fee.

ORDER

It is hereby ORDERED that Claimant's disability be terminated effective as of the date of this Decision and Order.

/s/ Daniel Lee Stewart
DANIEL LEE STEWART
Administrative Law Judge

Dated: May 29, 1991
San Francisco, California

DLS:bll

APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
211 Main Street—Suite 600
San Francisco, California 94105

Case No. 83-LHC-242

OWCP No. 18-6945

IN THE MATTER OF JOHN RAMBO, CLAIMANT

v.

METROPOLITAN STEVEDORE COMPANY
SELF-INSURED EMPLOYER

Before: JAMES J. BUTLER, Administrative Law Judge.

DECISION AND ORDER—
AWARDING BENEFITS

I. *Statement of the Case*

A. Pertinent statutes and regulations.

The instant claim was made under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter referred to as "the Act," and the regulations implementing the Act contained in Title 20, Code of Federal Regulations (C.F.R.), Parts 701 and 702. All code section references are to 33 U.S.C.A. (1970 ed. and Supp. V, 1975) unless otherwise indicated.

B. Stipulations.

The parties have stipulated as follows (29 C.F.R. § 18.51):

1. The employer and employee on all occasions herein were covered by the provisions of the Act. The employee had both an appropriate situs and status on the occasion of these events and the employer is a maritime employer.

2. The claimant, John Rambo, born April 11, 1945, bearing Social Security No. 547-64-2169, was employed as a longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg.

3. On the occasion of said injury, the employee's average weekly wages were $534.38 per week which the parties stipulate for all purposes was sufficient to produce a compensation rate of $356.26 per week for temporary total disability.

4. That the first lost time from work occurred September 10, 1980, and the employee was paid temporary total disability at the weekly rate of $356.26 per week for the period September 10, 1980 through and including November 22, 1981, in the total sum of $22,342.58, which sum fully satisfied all claims of temporary total disability.

5. That the employee's condition became permanent and stationary November 16, 1981, as indicated by Jack Paschall, Jr., M.D., as a result of an examination of November 16, 1981, outlined in a report dated November 30, 1981. That the date of November 16, 1981, is the appropriate date for the commencement of any permanent partial disability payments as are to be made herein.

6. That the employee sustained an overall current permanent partial disability equivalent to 22½% of the whole person which the parties recognize as an "economic disability" producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability.

7. The parties stipulate that all appropriate forms and notices were timely and properly filed including a timely controversion consistent with the positions of the parties and there is no basis for and no claim for penalties and/or interest in these proceedings.

8. That the claimant's attorney has rendered services both at the informal level and the formal level some of which directly relate to representation of the claimant wherein no controversion existed and some of which arise out of the dispute between the claimant and the employer. That in consideration of the documented time schedule and division of the services herein provided by claimant's attorney, claimant's attorney is entitled to separate fees from the claimant and the employer as follows:

a. As a lien on the employee's compensation, $1,000.00

b. Payable by the employer over and above the compensation otherwise called for herein the sum of $2,000.00 which sum fully satisfies all claims of fees for all purposes against this employer.

9. That all medical treatment has been provided by the employer herein and there are no claims for medical costs and/or related items outstanding. Any incidental billings as may remain will be adjusted by the parties between them for a full resolution of such items.

10. That the claimant is entitled to permanent partial disability based on the compensation rate equivalent to his stipulated wage loss or $80.16 per week commencing November 16, 1981, and continuing thereafter (subject to the employer's seeking Special Fund relief and all other provisions of the Act) with said payments to continue indefinitely less a lump sum payment of $1,000.00 for the attorney fees referred hereinabove.

11. That these Stipulations resolve all issues between the parties and the parties respectfully request Award issue in accordance therewith subject to the limitations of the Act.

II. *Findings and Conclusions—§908(f)*

The evidentiary hearing in this matter was directed toward issues of fact pertaining to the requirements of § 908(f) of the Act. An explanation of the intent and purposes of this section is no longer necessary. The claimant is not directly concerned and the employer is well acquainted with its provisions. It should suffice to say only that this employer is clearly qualified for the statutory relief it seeks by virtue of claimant's documented pre-existing disability attributable to previous low back injuries and the permanent residuals of those events (see, in particular, Joint Exhibits 1 & 2). The whole record presented fully supports employer position that it is eligible for a limitation of its liability under the circumstances brought forward. The claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent subject injury alone. Accordingly, the employer shall provide compensation for one hundred and four weeks only. After payment of the one hundred and

four week period, the claimant shall be paid the remainder of the compensation due him out of the Special Fund established for this and other purposes in § 944 of the Act. The employer shall, however, continue to provide the medical benefits required by § 907 of the Act.

ORDER

The parties hereto, now including the Director, OWCP, on account of the liability of the Special Fund, shall proceed in a manner consistent herewith and the terms and provisions of the Act and applicable regulations.

/s/ James J. Butler
JAMES J. BUTLER
Administrative Law Judge

Dated: Nov. 28, 1983
San Francisco, California

JJB:scm

APPENDIX E

[Filed Sep. 14, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-70783

OWCP No. 18-6945
BRB No. 91-1538

JOHN RAMBO,
CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY,
RESPONDENTS

ORDER

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the Director, Office of Workers' Compensation Programs' petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

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* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

[Filed Aug. 10, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-70783

OWCP No. 18-6945
BRB No. 91-1538

JOHN RAMBO,
CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; METROPOLITAN STEVEDORE COMPANY,
RESPONDENTS

ORDER

Before: REINHARDT and LEAVY, Circuit Judges, and BROWNING,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Browning has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable William D. Browning, Chief United States District Judge for the District of Arizona, sitting by designation.

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No. 94-1045

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,
vs.
JOHN RAMBO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a party seeking a 33 U.S.C. § 922 Modification of an Award of Permanent Partial Disability prove that the Claimant has undergone a change in "physical condition"?

2. Should the employer's Application For Modification be denied because of the representations of its attorney to the injured worker that the award would be paid for life? (S. Ct. Rule 15.1)

PARTIES TO THE PROCEEDING

Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor (94-1045).

Respondent, John Rambo is an individual resident of Los Angeles, California.

Petitioner, Metropolitan Stevedore Company (94-820).

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No. 94-1045

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

JOHN RAMBO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

The Respondent, John Rambo, respectfully requests that this Court deny the Petition For Writ of Certiorari submitted by the Petitioner, Director, Office of Workers' Compensation Programs, United States Department of Labor, seeking review of the Ninth Circuit's decision in this case.

PROCEDURE BEFORE THE SUPREME COURT

On November 5, 1994 Metropolitan Stevedore filed a Petition For Writ of Certiorari with the Clerk of the United States Supreme Court (94-820). On December 2, 1994, Rambo filed his reply to that Petition For Writ of Certiorari. On December 12, 1994, the 89th day after the Ninth Circuit denied Rehearing, the Director filed this Petition For Writ of Certiorari (94-1045).

DISCUSSION

The Reply Brief by Rambo that is already on file with this Court sets forth all of Respondent's authorities, precedent and argument. However, Rambo would like to make the following additional statement.

It cannot be denied that since 1933 the party moving for a 33 U.S.C. § 922 Modification has had the threshold burden of proving that there was a change in the injured worker's physical condition. Once that burden has been met, all other circumstances become relevant. Absent a showing of a change in the physical condition of the injured worker other circumstances are irrelevant. *McCormick Steamship Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933); *See, e.g., General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 673 F.2d 23, 25 n.6 (1st Cir. 1982); *Burley Welding Works, Inc. v. Lawson*, 141 F.2d 1964, 966 (5th Cir. 1944).

In 1985 the Director opined, and was able to convince two judges of the Fourth Circuit, that a 33 U.S.C., § 922 Modification was justified merely by showing an

increase in the injured worker's earnings. *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985). The corollary of the Director's position is that the injured worker is entitled to an upward modification of his award upon a showing of a decrease in his earnings. If this roller coaster approach is adopted every claim for compensation for a nonscheduled award will inspire multiple petitions by each party based upon changes in the business cycle and the inevitable claim by the injured worker for permanent total disability in the twilight years of the worker's earning life.

In support of the Director's position the Solicitor advances three arguments.

FIRST — Uniformity of the statutory scheme.

The only support for a legislative uniform scheme that the Solicitor offers is the termination of death benefits on the death or remarriage of a widow and termination of death benefits for a dependent child upon the child's reaching majority. This is at best a make weight argument. There is neither legislative history nor precedent to support this contention. Interestingly, the Solicitor fails to note that under the Director's scheme of § 922 Modifications for a nonscheduled injury, i.e. arms, legs, etc., the moving party will still be required to present medical evidence of a "change in physical condition." Whereas, in a Petition For Modification of a nonscheduled award, i.e. head, neck or back, the moving party only need show a change in the earnings of the injured worker. How does this comport with a uniform legislative scheme?

SECOND — Rehabilitation of the injured worker.

It must be pointed out that in both *Fleetwood*, *supra* and *Rambo*, *supra*, the moving party presented no evidence of rehabilitation. The only evidence present in

BOTH cases was an increase in the earnings of the injured worker. Indeed in Rambo the employer in its Petition for Modification stated:

> "In this case we [Petitioner] can clearly show simply by the earnings information *ALONE* . . ." Emphasis added, Appendix A3 of Respondent's Reply to the Employer's Petition For Writ of Certiorari.

THIRD — Deference due the opinion of the Director.

Fortunately in our system of government, the judicial branch is not required to render lock step allegiance to a plenipotentiary of the Executive Branch of our government, including the Director of the United States Department of Labor. It is respectfully submitted that in the face of Sixty years of precedent which has required a moving party in a 33 U.S.C. § 922 Modification Petition to show a change in physical condition, to substitute a never ending series of Petitions For Modification based solely upon the march of inflation, changes in the business cycle and the inevitable decline in earnings of the injured worker at the conclusion of his earning career is not only inappropriate, it is unwise. The Director's position in *Fleetwood* and in *Rambo* is misguided. The Ninth Circuit Court of Appeals corrected the Director in this case. It is respectfully submitted that the most efficient manner for this Court to again inform the Director of her mistake is simply — "Cert. Denied."

CONCLUSION

Therefore, Respondent prays that the Court deny the Director, Office of Workers' Compensation Programs, United States Department of Labor's Petition For Writ of Certiorari because this case presents no issue appropriate for the Court's review, and because the lower Court's holding was not in error.

DATED: December 21, 1994.

Respectfully submitted,

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Counsel of Record

PIERRY & MOORHEAD

Attorney for Respondent
JOHN RAMBO

No. 94-1045

JAN 9 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOHN RAMBO AND METROPOLITAN STEVEDORE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1045

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOHN RAMBO AND METROPOLITAN STEVEDORE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondent John Rambo argues (Br. in Opp. 3) that if disability awards may be modified absent a change in the claimant's physical condition, "every claim for compensation for a nonscheduled award will inspire multiple petitions by each party based upon changes in the business cycle." That contention is without merit. The administrative law judge (ALJ) in this case recognized that "higher post-injury gains/losses are not necessarily determinative of an employee's wage-earning capacity. One has to consider wage-earning capacity in an open labor market under normal employment conditions." Pet. App. 13a (citation omitted). In concluding that Rambo no

longer suffered a loss of wage-earning capacity, the ALJ noted that Rambo's increased wages were not attributable solely to the effects of inflation and salary increases; that Rambo was at no greater risk of losing his present job or in seeking new employment than anyone else; and that his present employment was not the result of a "beneficent" employer. *Id.* at 14a-15a. The Benefits Review Board noted that Rambo had completed vocational training (*id.* at 6a) and rejected his contention that the absence of any change in his physical condition precluded modification. *Id.* at 8a. It went on to note that Rambo "has raised no error committed by the administrative law judge in weighing the evidence and granting modification based on [Rambo's] increase in wage-earning capacity after the original award of benefits." *Ibid.*

Thus, nothing in the decision of the ALJ or the Board suggests that modification under 33 U.S.C. 922 follows automatically from a finding that the claimant's actual wages have increased. Rather, the ALJ and the Board simply concluded that an individual's wage-earning capacity may increase even though his physical condition remains unchanged, and that such an increase in wage-earning capacity constitutes a "change in conditions" supporting modification under Section 922. The court of appeals, by contrast, held that an increase in a claimant's wage-earning capacity can never provide a basis for modification unless it involves a change in the claimant's physical condition. See Pet. App. 2a ("a mere change in a claimant's wages, training, skills, or educational background is not sufficient to meet the 'change in conditions' requirement for an award modification").

2. Rambo contends (Pet. i) that he was told by his employer's attorney that if he accepted his initial

disability award, it would be paid for life. Rambo, whose own attorney was present at this alleged conversation (C.A. E.R. 56-57), presented this allegation as part of his argument to the Board that the employer should be estopped from withdrawing from a supposed "settlement." Pet. for Rev. 5-7 (Ben. Rev. Bd. No. 91-1538). The ALJ and the Board both rejected Rambo's contention that modification was inappropriate because the award had been obtained pursuant to a "settlement." Pet. App. 11a-12a, 7a-8a. The court of appeals did not address that claim. If this Court grants the petition for a writ of certiorari and reverses the judgment of the Ninth Circuit, it will be open to the court of appeals on remand to decide whether Rambo remains free to oppose modification on that ground. The mere possibility that Rambo might ultimately obtain relief on that alternative ground, however, should not prevent this Court from reviewing the erroneous legal ruling of the court of appeals, which squarely conflicts with the Fourth Circuit's decision in *Fleetwood* v. *Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (1985).

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JANUARY 1995